IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-784

ELVIA ESCAMILLA MORENO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner Elvia Escamilla Moreno respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the proceeding on September 1, 1978.

OPINION BELOW

The opinion of the Court of Appeals is reported at 579 F.2d 371 and is reproduced in the Appendix hereto. The opinion of the Trial Court on the search question is unreported and is found in the record at pp. 322-350. Said opinion is reproduced in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 1, 1978. A timely petition for rehearing en banc was denied on October 16, 1978, and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Whether the Border Patrol immigration checkpoint located near Sarita, Texas which is approximately seventy-three (73) miles inland from the international border with the Republic of Mexico, and which is located between substantial population centers within the United States can be considered the "functional equivalent" of the border for the purposes of government searches of vehicles without consent or probable cause.

2. Whether there was sufficient evidence before the Courts below to hold that an immigration checkpoint located approximately seventy-three (73) miles from the true border and inland from major domestic population centers was the "functional equivalent" of the border for purposes of searches without consent or probable cause.

3. Whether a Border Patrol agent may search without probable cause a compartment which is too small to conceal an illegal alien which is contained in a motor vehicle stopped at a Border Patrol immigration checkpoint located approximately seventy-three (73) miles inland from the true border.

4. Whether the fact that Petitioner was driving a borrowed vehicle in which contraband was hidden, without more, was sufficient evidence for a conviction.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATUTORY PROVISIONS INVOLVED

The following statutory provisions involved are reproduced in the Appendix hereto:

Title 8, United States Code § 1357(a),(c)

Title 21, United States Code § 841(a)(1)

REGULATORY PROVISIONS INVOLVED

The following regulatory provisions involved are reproduced in the Appendix hereto:

Title 8, Code of Federal Regulations § 287.1

STATEMENT OF THE CASE

Petitioner was charged by indictment with one count of violating Title 21, United States Code Section 841(a)(1), in which Petitioner was charged with possession of one hundred eighty-nine (189) pounds of marijuana with intent to distribute.

The indictment was returned on September 16, 1977 (R. 307). On September 23, 1977, Petitioner was arraigned and entered a plea of not guilty. The jury was selected on December 13, 1977. The trial was conducted

on December 28 and 29, 1977, at the conclusion of which the jury convicted Petitioner (R. 351).

On February 13, 1978, the Trial Court sentenced Petitioner to four (4) years imprisonment with a special parole term of three (3) years (R. 357).

In the course of the proceedings below, Petitioner moved the court for suppression of the fruits of the search of the vehicle driven by her (R. 309) and for adjustment of acquittal after the Government rested (R. 70). These motions were denied.

The vehicle being driven by Petitioner was stopped at the Border Patrol checkpoint near Sarita, Texas for citizenship questioning on September 13, 1977 (R. 20 *et seq.*). Border Patrol Agent Cecilio L. Ruiz, Jr., in his testimony testified that he was suspicious of the vehicle and its occupants (Petitioner and her sister) because Petitioner stopped the 1975 Chevrolet pickup truck she was driving close to the center stripe of the road (R. 23), both Petitioner and her sister appeared to be nervous when they advised that they were U.S. citizens (R. 23), Petitioner would "look at [him] and look away" and the passenger would not look at him, and the passenger "claimed that she was a Jehovah's Witness, and tried to give him a Watchtower, one of the religious books that are used by that religion" (R. 24). Agent Ruiz asked Petitioner to pull into the secondary inspection area and observed that "where the bumper came close to the bed of the truck, it had a flange with a screw on it, on both sides" (R. 25). Agent Ruiz testified that this "caused [him] to believe that *something* was being hid under the truck" (R. 25) (emphasis added). At this point Agent Ruiz "looked underneath, and . . .

could see two hinges right behind the bumper" and "under the bed it looked like somebody had done some welding under the truck" (R. 26). Agent Ruiz then surmised that something was being concealed under the pickup truck bed (R. 27). Then Agent Ruiz and other agents began a more extensive search of the pickup truck. They searched under the seat of the pickup truck and found tools which fit the bolts and nuts underneath the truck bed. The agents took bolts off the truck bed and raised "the bed of the truck like a dump truck" and "found plastic bags which contained marijuana." (R. 28).

Agent Ruiz testified that he was *not able* to smell marijuana as he stood beside the truck. (R. 38). Agent Ruiz had no prior information about Petitioner (R. 34) and only knew that the truck came from a southern direction (R. 54).

No additional probable cause existed for the substantial intrusion into the areas of the truck not otherwise visible and in which an illegal alien could not hide. Defense Exhibits 1 through 8 clearly show the extent of the intrusion and the fact that an illegal alien could not possibly fit into the space searched.

The search of Petitioner's vehicle was clearly not based upon any combination of information, facts and circumstances which would add up to probable cause under even the most lenient interpretation of probable cause.

The Trial Court below, in order to validate the search in question, entered its finding relying upon its previous rulings and held that the Sarita checkpoint "constitutes the functional equivalent of the border." (R. 5 *et seq.*; R. 349).

The Trial Court below, over the objection of the defense (R. 7 *et seq.*), took judicial notice of facts previously determined by it in two previous criminal cases and incorporated in the record of this case orders by it in those prior cases (R. 322). In such previous orders the Trial Court below had found that the Border Patrol checkpoint in question was the functional equivalent of the border (R. 343, 349). The court found that the Sarita checkpoint is approximately seventy-three (73) miles by highway from the Mexican border (R. 331, 346) on U.S. Highway 77; that there is no public access to U.S. Highway 77 for a distance of fifty (50) miles south of Sarita (R. 332); that northbound traffic is normally checked twenty-four (24) hours a day (R. 333); that several hundred thousand citizens reside in the United States territory immediately south of the Sarita checkpoint (R. 335); that there were approximately 1,705 vehicles per day traveling north which were subject to inspection at the Sarita checkpoint (R. 336); that eighty-five percent (85%) are either waived through or are stopped for no more than three to five seconds (a length of time which seems incredibly short to this writer); that 14.7% of the vehicles stopped are stopped no more than three minutes; and that perhaps 0.03% are stopped for "secondary inspection." (R. 328-329).

Petitioner needed to travel from her home in San Benito, Texas, to Houston, Texas, to pick up her sister but could not do so because her automobile was in need of repair (R. 142). A man known to Petitioner by the name of Isidoro Martinez, who was a customer in Petitioner's restaurant (R. 139 *et seq.*) suggested that she drive his pickup truck to Houston (R. 142 *et seq.*)

Petitioner had no knowledge of the presence of marijuana in the hidden compartment of the truck (R. 151). After her arrest, Petitioner attempted to locate Mr. Martinez (R. 163). Special Agent Louis W. Dracoulis of the Drug Enforcement Administration testified that:

> [Petitioner] told [him] that an individual who she did not wish to name because she was afraid of him had loaned her the pickup truck to drive it to Houston and that this pick-up truck was to be driven to Houston for $200.00 which she was to receive the following day when the man would go and pick up the pickup truck in Houston, Texas, at her brother-in-law's residence. (R. 199).

The Government agents did not take fingerprints from the hidden compartment or the wrappings on the marijuana (R. 205); in fact, the Trial Court denied Petitioner's trial counsel the opportunity to fully cross-examine the agent on this issue (R. 206). Nor did the agents attempt to interview the owner of the pickup truck who might have been involved in involving an innocent party, Petitioner, in this transaction (R. 221 *et seq.*) in order to check out the leads furnished by Petitioner which would establish her innocence. There was no showing by the Government that Petitioner could have known of the existence of the marijuna other than the mere circumstantial inference made from her possession of the truck. Agent Ruiz testified that he could not smell marijuana emitting from the pickup truck (R. 38) and the inference is clear from the record that Petitioner could not smell marijuana from the driver's seat of the truck (R. 46-47). And the marijuana was not easily accessible (R. 47-48).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decisions of other Courts of Appeals and of the Supreme Court as to the legality of searches by Border Patrol agents at immgration checkpoints located inland from the true border which are conducted without consent or probable cause.

In *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), the Supreme Court defined "true border searches" as searches which take place either at the border itself or its "functional equivalent." Unfortunately, the Supreme Court has failed to adequately define that term which has created a theory of an extended border at which the Fourth Amendment's prohibition of unreasonable searches has no effect.

Subsequent to its decision in *Almeida-Sanchez v. United States, supra,* the Supreme Court invalidated searches of vehicles at an alien checkpoint similar to the one at Sarita. In *United States v. Ortiz,* 422 U.S. 891 (1975), the Supreme Court had before it a case in which Border Patrol agents had stopped Ortiz's car for a routine immigration search at a permanent traffic checkpoint located at San Clemente, California, sixty-two (62) air miles north of the Mexican border. During the search, the officers found three aliens concealed in the trunk of the car. When the case reached the Supreme Court, the Court held that,

> . . . at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause. 422 U.S. at 896-897.

Petitioner respectfully submits that an immigration checkpoint located a considerable distance from the true

border can only rarely be considered the "functional equivalent" of the border and can never be so considered when that checkpoint, as in the present case, is located between large domestic population centers. This view is supported by the language used by Mr. Justice Powell in *Bowen v. United States,* 422 U.S. 916, at 918 (1975).

> We hold today in United States v. Ortiz, ante, p. 891 [422 U.S.] that the Fourth Amendment, as interpreted in Almeida-Sanchez forbids searching cars at traffic checkpoints in the absence of consent or probable cause.

In the present case, as in *United States v. Ortiz, supra,* "the officers advanced no special reasons for believing [Petitioner's] vehicle contained aliens. The absence of probable cause makes the search invalid." 422 U.S. at 897-898.

When the Border Patrol agents began their search of the vehicle driven by Petitioner, they had no articulable facts upon which to base probable cause that there was contraband contained within the hidden compartment of the vehicle, that the vehicle had crossed a United States border, *United States v. Tilton,* 534 F.2d 1363 (9th Cir. 1976) or that an illegal alien could hide within the small area under the truck bed. *Contreras v. United States,* 291 2d 63 (9th Cir. 1961).

For the purpose of determining whether the Sarita checkpoint may be considered to be the functional equivalent of the border, it is important to consider that *United States v. Ortiz, supra,* arose from the San Clemente, California checkpoint and that *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976), was the consolidation of a case involving the San Clemente checkpoint and another involving the Sarita checkpoint. In *United States v. Mar-*

tinez-Fuerte, supra, the Supreme Court noted the many similarities between the San Clemente checkpoint and the Sarita checkpoint and discussed the operation of checkpoints which is considerably different than the conduct approved in the present case by the Courts below:

> While the need to make routine checkpoint stops is great, the consequent intrusion on the Fourth Amendment interests is quite limited. The stop does intrude to a limited extent on motorists' right to "free passage without interruption" and arguably on their right to personal security. But it involves only a brief detention of travelers during which "[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing the right to be in the United States". Neither the vehicle nor its occupants is searched, and visual inspection of the vehicle is limited to what can be seen without a search. (Citations omitted) 428 U.S. at 557-558.

In *United States v. Bowen,* 500 F.2d 960 (9th Cir. 1974), aff'd. 422 U.S. 916 (1975), the Ninth Circuit Court of Appeals held that the San Clemente, California immigration checkpoint (which is very similar in relation to the border and operation to the Sarita, Texas checkpont, see *United States v. Martinez-Fuerte, supra*) was not the "functional equivalent" of the border. 500 F.2d at 965. See also *United States v. Escalante,* 554 F.2d 970 (9th Cir. 1977); *United States v. Juarez-Rodriquez,* 568 F.2d 120 (9th Cir. 1977). That Court stated in *Bowen:*

> We hold then, that fixed-checkpoint searches, like roving-patrol searches, even though conducted within a "reasonable distance from the border, are not necessarily exempt from the traditional Fourth Amendment requirement of a warrant or probable cause. This holding, however, merely shifts the focus

> of our inquiry. The opinion in *Almeda-Sanchez* does not require that a border search, to be constitutional, be at the border itself; rather a legitimate border search may also be conducted under "certain circumstances" at the border's "functional equivalents." 413 U.S. at 272. *The search conducted in the present case was obviously not at the border itself; nor was it at a "functional equivalent" of the border.* (Emphasis added.)
>
> . . . [I]f a search takes place at a location where virtually everyone searched has just come from the other side of the border, the search is a functional equivalent of a border search. In contrast, if a search takes place at a location where a significant number of those stopped are domestic travelers going from one point to another within the United States, the search is not the functional equivalent of a border search. One need only contemplate the volume of domestic travel between Buffalo and Rochester, New York, to see why a checkpoint between those two cities could not be the functional equivalent of a border checkpoint even though the checkpoint could be less than twenty miles from an international border. 500 F.2d at 965.

A similar result has been reached in the Tenth Circuit. However, the opinions of the Tenth Circuit regarding the question of the "functional equivalency" of the border of immigration checkpoints leave the question somewhat unanswered while leaving the impression that in the Tenth Circuit immigration checkpoints located away from the true border are not the functional equivalent of the border for purposes of searches. *United States v. King,* 485 F.2d 353 (10th Cir. 1973); *United States v. Maddox,* 485 F.2d 361 (10th Cir. 1973).

The Court below based its holding that the search of the vehicle driven by Petitioner was valid upon its

decision holding the immigration checkpoint located near Sarita, Texas to be the functional equivalent of the border. The Government did not attempt to justify the search of Petitioner's vehicle based upon probable cause but instead contended that the checkpoint was the functional equivalent of the border. Both the Ninth Circuit in *Bowen, Escalante,* and *Juarez-Rodriguez* and the Tenth Circuit in *King* and *Maddox* (only inferentially however) have held that immigration checkpoints located away from the true border as the checkpoint in the present case are not the "functional equivalent" of the border. Obviously the time has come for this Court to deal with the issue of what is the functional equivalent of the border for purposes of the Fourth Amendment protection inasmuch as the issue will arise frequently in the border areas of the Fifth Circuit.

2. The decision below raises significant and recurring questions concerning the legality of searches conducted by government agents at immigraton checkpoints located inland from the true border which are conducted without consent or probable cause, in that the courts below had insufficient evidence upon which to hold that the immigration checkpoint located near Sarita, Texas is the "functional equivalent" of the Border.

The Fifth Circuit Court of Appeals had earlier held that:

> [n]o checkpoint which occasions, day in and day out the interdiction of anything approaching a majority percentage of domestic traffic can properly be seen as approximating the border. *United States v. Alvarez-Gonzales,* 542 F.2d 226, at 229 (5th Cir., 1976). See also *United States v. Bowen, supra.*

It is respectfully submitted that the above standard is at least a more valid test than that which the Trial Court below considered. In its opinion on the issue raised here, the Trial Court did not have evidence before it to support a conclusion that the Sarita checkpoint did not "occasion . . . the interdiction of anything approaching a majority percentage of domestic traffic." (R. 322 *et. seq.*). The checkpoint is located north of "more populated areas of the Lower Rio Grande Valley" (opinion of the Trial Court below at R. 327). As the Trial Court below pointed out "there are, of course, ports of entry at Brownsville, Progresso, Hidalgo, and across from Rio Grande City" (R. 336). See also *United States v. Hart,* 506 F.2d 887, vacated and remanded, 422 U.S. 1053, reaff'd. 528 F.2d 1199 (5th Cir. 1976) (on remand). The Official Highway Travel Map covering this area and prepared by the Texas Highway Travel Map covering this area and prepared by the Texas Highway Department clearly shows that these major population centers are located between the border with the Republic of Mexico and the Sarita checkpoint. This map was expressly made a part of the record by the Trial Court below. (R. 335). Several hundred thousand citizens reside in the United States territory immediately south of the Sarita checkpoint. (R. 335).

The argument in 1. above is reurged herein.

The holding of the Court below is contrary to the Fourth Amendment of the Constitution and the holding of the Ninth Circuit in *Bowen,* and such conflict justifies the grant of certiorari to review the judgment below.

3. The decision below conflicts with the decisions of other Courts of Appeal as to the legality of searches of compartments too small to conceal an alien which are conducted by Government agents at immigration checkpoints located inland from the true border.

The Court of Appeals for the Ninth Circuit held in *Contreras v. United States, supra,* that a search of a small paper sack found in an automobile stopped at a traffic checkpoint located 72 miles from the border was illegal. In the present case it is important to note that the compartment searched was too small to conceal an alien person (Defendant's Exhibits 1 through 9) and that by the agent's own testimony he was not searching for a person. (R. 25).

These conflicts justify the grant of certiorari to review the judgment below.

4. The decision below conflicts with the decisions of other Courts of Appeal as to the sufficiency of the evidence.

Other than the fact that Petitioner was driving the borrowed truck in which the marijuana was so well concealed that it could not be smelled by a person standing beside the truck (R. 38, 47-48) and the agents literally had to dismantle the truck to find the marijuana. (R. 47-48) There was little if any evidence of Petitioner's knowing possession.

The Ninth Circuit has held the fact that an individual was driving the vehicle in which contraband is found is not enough to support an inference of knowledge of the presence of the contraband, particularly in a situation

such as presented in this case where Petitioner had possession of the vehicle only a short period of time and the compartment was completely hidden to the unsuspicious mind and Petitioner made a reasonable explanation at the time of arrest. *United States v. Martinez,* 514 F.2d 334 (9th Cir. 1975).

Mere presence of a person at the scene of a crime *without more* is insufficient to support a conviction for that crime. *United States v. Henderson,* 524 F.2d 489 (5th Cir. 1975); *United States v. Vilhotti,* 452 F.2d 1186 (2nd Cir. 1971); *United States v. Cooper,* 567 F.2d 252 (3rd Cir. 1977).

The Government has the burden of proving that a defendant exercised dominion and control over the drugs (or where there is no physical possession, the constructive possession must be established) in order to prove the necessary *mens rea* as pertains to knowing possession of the contraband. *United States v. Steward,* 451 F.2d 1203 (2nd Cir. 1971).

Petitioner respectfully submits that there was insufficient evidence introduced in her trial as to any knowledge on her part of the existence of the contraband in the pickup truck upon which to base a finding of guilt.

Petitioner further respectfully submits *arguendo* that if the evidence is sufficient to support her conviction the evidence of her knowing possession of marijuana is a circumstantial inference at best.

When the prosecution's case is based upon circumstantial inferences, the prosecution has the burden of checking out and disproving those reasonable explanations which negate the circumstantial inference. *Holland*

v. United States, 348 U.S. 121 at 136-137 (1954) (net worth method of proving tax evasion); *United States v. Rully,* 136 F.Supp. 881 (D. Conn.1955) (net worth); *Huff v. State,* 492 S.W.2d 532 (Tex.Cr.App. 1973) (recent unexplained possession of stolen property).

When Petitioner's trial counsel attempted to develop this inadequacy of the Government's investigation (R. 14-18), the Trial Court *sua sponte* prevented defense counsel from developing this area (R. 18-20).

Petitioner respectfully submits that when the Government relies upon circumstantial inferences, as in the case of Petitioner's inferential knowing possession of the marijuana based upon her possession of the vehicle in which it was well hidden, the Government has the burden to disprove the reasonable explanation of that circumstance.

These conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX "A"

STATUTORY PROVISIONS INVOLVED

United States Code, Title 8

§ 1357(a), (c) Powers of immigration officers and employees—Powers without warrant

(a) Any officer or employee of the Service authorized under regulations prescribed by the Attorney General shall have power without warrant—

(1) to interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States;

(2) to arrest any alien who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, or expulsion of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest, but the alien arrested shall be taken without unnecessary delay for examination before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States;

(3) within a reasonable distance from an external boundary of the United States, to board and search for aliens any vessel within the territorial waters of the United States and any railway car, aircraft, conveyance, or vehicle, and within a distance of twenty-five miles from any such external boundary to have

access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States; and

(4) to make arrests for felonies which have been committed and which are cognizable under any law of the United States regulating the admission, exclusion, or expulsion of aliens, if he has reason to believe that the person so arrested is guilty of such felony and if there is likelihood of the person escaping before a warrant can be obtained for his arrest, but the person arrested shall be taken without unnecessary delay before the nearest available officer empowered to commit persons charged with offenses against the laws of the United States. Any such employee shall also have the power to execute any warrant or other process issued by any officer under any law regulating the admission, exclusion, or expulsion of aliens.

* * *

SEARCH WITHOUT WARRANT

(c) Any officer or employee of the Service authorized and designated under regulations prescribed by the Attorney General, whether individually or as one of a class, shall have power to conduct a search, without warrant, of the person, and of the personal effects in the possession of any person seeking admission to the United States, concerning whom such officer or employee may have reasonable cause to suspect that grounds exist for exclusion from the United States under this chapter which would be disclosed by such search. June 27, 1952, c.477, Title II, ch. 9 § 287, 66 Stat. 233.

United States Code, Title 21

§ 841(a)(1) Prohibited acts A—Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . .

REGULATORY PROVISIONS INVOLVED

Code of Federal Regulations, Title 8

PART 287—Field Officers; Powers and Duties
§ 287.1 Definitions

(a)(1) *External boundary.* The term "external boundary," as used in section 287(a)(3) of the Act, means the land boundaries and the coast line of the United States, including the ports, harbors, bays and other enclosed arms of the sea along the coast, and a marginal belt of the sea extending three geographic miles from the outer limits of the land that encloses an arm of the sea.

(2) *Reasonable distance.* The term "reasonable distance," as used in section 287(a)(3) of the Act, means within 100 air miles from any external boundary of the United States or any shorter distance which may be fixed by the district director, or, so far as the power to board and search aircraft is concerned any distance fixed pursuant to paragraph (b) of this section.

(b) *Reasonable distance; fixing by district directors.* In fixing distances not exceeding 100 air miles pursuant to paragraph (a) of this section, district directors shall

take into consideration topography, confluence of arteries of transportation leading from external boundaries, density of population, possible inconvenience to the traveling public, types of conveyances used, and reliable information as to movements of persons effecting illegal entry into the United States; *Provided*, That whenever in the opinion of a district director a distance in his district of more than 100 air miles from any external boundary of the United States would because of unusual circumstances be reasonable, such district director shall forward a complete report with respect to the matter to the Commissioner, who may, if he determines that such action is justified, declare such distance to be reasonable.

(c) *Exercise of power by immigration officers.* Any immigration officer is hereby authorized to exercise anywhere in the United States all the powers conferred by Section 287 of the Act.

(d) *Disposition of felony cases.* The cases of persons arrested for felonies under paragraph (4) of section 287(a) of the Immigration and Nationality Act shall be handled administratively in accordance with the applicable provisions of § 287.2 but in no case shall there be prejudiced the right of the person arrested to be taken without unnecessary delay before another near-by officer empowered to commit persons charged with offenses against the laws of the United States.

(e) *Power to arrest persons who bring in, transport, or harbor certain aliens, or induce them to enter.* Any immigration officer shall have authority to make arrests for violations of any provisions of section 274 of the Immigration and Nationality Act.

(f) *Patrolling the border.* The phrase "patrolling the border to prevent the illegal entry of aliens into the United States" as used in section 287 of the Immigration and Nationality Act means conducting such activities as are customary, or reasonable and necessary, to prevent the illegal entry of aliens into the United States.

[22 FR 9808, Dec. 6, 1957, as amended at 29 FR 13244, Sept. 24, 1964]

APPENDIX "B"

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ELVIA ESCAMILLA MORENO,
Defendant-Appellant

NO. 78-5154

Summary Calendar.*

United States Court of Appeals,

Fifth Circuit

September 1, 1978.

Before BROWN, Chief Judge, COLEMAN and VANCE, Circuit Judges.

PER CURIAM:

On September 13, 1977, at about 9 o'clock, a.m., appellant and her sister, Estella Moreno, approached the Sarita checkpoint in a pickup truck. Border Patrol Agent Ruiz questioned the occupants about their citizenship and determined they were Americans. Ruiz noticed that they appeared to be nervous and asked them to proceed to the secondary inspection area. Ruiz noticed the rear bumper had a flange with screws on it. He looked under the truck and saw two hinges behind the bumper and that some welding had been done. He saw a compartment under the truck. Using tools found beneath the cab, he lifted the bed of the truck and found 189 pounds of marijuana.

Appellant's story was that she had borrowed the truck from an acquaintance named Martinez, who frequented her restaurant in San Benito, Texas. She was taking her sister to the psychiatrist in Houston. She borrowed the vehicle because her car was not in running condition. DEA Agent Dracoulin testified, however, that appellant told him she was paid $200 to drive the truck to Houston. Both appellant and her sister testified that they had not made any such statement. Appellant was found guilty of possession with intent to distribute marijuana.

In this appeal, appellant says the search was invalid for lack of probable cause. She also argues that the trial court erred in taking judicial notice of its previous decisions on Sarita. Finally, she argues there was no evidence she possessed the marijuana.

[1] In *United States v. Reyna,* 5 Cir., 1978, 572 F.2d 515, we held that Sarita was the functional equivalent of the border. Where a search is conducted at the border or at a functional equivalent of the border, no probable cause is required. *Almeida-Sanchez v. United States,* 413 U.S. 266, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973).[1]

[2] The court could take judicial notice of its prior decisions regarding the characteristics of the Sarita checkpoint, Fed. Rules of Evid. Rule 201; *United States v. Alvarado,* 5 Cir., 1975, 519 F.2d 1133.

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1. The structural discrepancy observed by the officer while performing his duty, if it were necessary for us to reach that point, would be appraised under *Coolidge v. New Hampshire,* 403 U.S., 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *United States v. Arredondo-Hernandez,* 5 Cir., 1978, 574 F.2d 1312.

[3, 4] As driver of the pickup, appellant had sufficient dominion and control to possess the marijuana. *United States v. Rodriguez*, 5 Cir., 1977, 556 F.2d 277; *United States v. Legeza*, 5 Cir. 1977, 559 F.2d 441. Under the circumstances, the jury was justified in disbelieving appellant's claim of ignorance and finding she had the requisite possession and intent to distribute. Any conflicts in the evidence must be resolved in favor of the jury verdict. *United States v. Warner*, 5 Cir., 1971, 441 F.2d 821.

AFFIRMED.

APPENDIX "C"

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CR. NO. C-77-219

UNITED STATES OF AMERICA,

v.

ELVIA ESCAMILLA MORENO,

O R D E R

The Court does hereby take judicial notice of the location, justification, and other physical aspects of the Border Patrol checkpoint near Sarita, Texas, which is set up to control the entry of illegal aliens into this country and the traffic in illegal aliens on this side of the border, as determined by this Court in two other criminal actions, *United States of America v. Jose Asencion Garcia*, Cr. No. 72-C-62, and *United States of America v. Steven Wayne Clay*, Cr. No. C-77-252. Such determination was made in said No. 72-C-62 by the Court's order filed therein on July 30, 1974 (here designated by the Court as its Exhibit A), and by the Supplemental Findings of Fact and Conclusions of Law filed September 12, 1974 (here designated by the Court as its Exhibit B). Such determination was made in No. C-77-252 by the Court's order of December 20, 1977 (here designated by the Court as its Exhibit C). The Court has the authority to take judicial notice of such

facts under Rule 201 of the Federal Rules of Evidence. *See United States of America v. Alvarado,* 519 F.2d 1133, 1135 (5th Cir. 1975).

The Court now ORDERS that its Exhibits A, B and C, just described, be filed as a part of the record in this case.

SIGNED this 28th day of December, 1977.

/s/ OWEN D. COX
United States District Judge

Court's Exhibit "A"

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CR. NO. 72-C-62

UNITED STATES OF AMERICA

v.

JOSE ASENCION GARCIA

O R D E R

This Defendant, Jose Asencion Garcia, was charged by indictment with, on or about the 13th day of April, 1972, possessing with intent to distribute approximately 176 pounds of marihuana. This Defendant was driving a motor vehicle and was stopped by Border Patrol agents five (5) miles south of Sarita, Texas, on U.S. Highway 77, at what was commonly referred to as a Sarita "checkpoint." The car was searched and marihuana was seized and the Defendant was arrested. The Defendant filed his motion to suppress the evidence, to wit, the marihuana involved, claiming the search was made without a valid warrant and without probable cause, in violation of the Fourth and Fourteenth Amendments of the Constitution of the United States.

On the 6th day of June, 1974, the trial of this case was commenced before the Court and the motion to suppress was carried along. The initial testimony admitted at this hearing involved the authority for and the location of

the Sarita checkpoint and general facts regarding the operations of checkpoints. The factual presentation by the government witnesses was in considerable detail. There were objections made by defense counsel to some of the testimony as being hearsay and immaterial. There were a few conflicts developed at the hearing by cross-examination, but these related only to the conclusions drawn by government witnesses from the facts presented. It is the Court's intention to make detailed findings of fact from the evidence presented as to the location of the Sarita checkpoint and the manner in which it was operated during April, 1972; and, also, as to what happened to this Defendant at this checkpoint and the search conducted. At the same time, the Court will point out the issues raised by the Defendant.

There are several checkpoints located in South Texas. Each one, such as the Sarita checkpoint, is manned by the United States Border Patrol, which was established in 1924 as a part of the Immigration and Naturalization Service.

The Court hopes these extended findings will be of assistance in the final determination of the lawfulness or unlawfulness of the Sarita checkpoint as it was located and operated in April, 1972; that is, was it lawful or unlawful for the Border Patrol agent at the point to stop vehicles traveling north on said U.S. Highway 77 for the purpose of a routine border search for aliens. The Court feels that the validity of a particular checkpoint, in this case the one below Sarita should not have to be established in every case tried. If the Sarita checkpoint, which has been set up for the purpose of a routine search for aliens, should be considered valid, as this Court believes

it is, that should be the end of the matter, unless, thereafter, some radical change in location or the modus operandi has occurred. The Court wishes to point out that, although at the time of the apprehension of this Defendant the Sarita checkpoint might have been set up at one of two permanent locations, the Border Patrol has used only the location five (5) miles below Sarita, being the one here involved, since Mid-August, 1973.

One of the issues in this case revolves around the government's contention that the Border Patrol has the primary function of preventing the illegal entry of aliens and the apprehension of those who are illegally in this country, and that, as a part of such function, it is concerned with the arrest of those who smuggle illegal aliens into the United States. The Court specifically finds this to be true, both in theory and in practice. The Defendant took issue, contending by cross-examination that the primary function of the Patrol was really to ferret out illegal traffickers in narcotics and other controlled substances.

In order to describe the complete procedure used by the Border Patrol in trying to protect our borders, we need to start with the first line of defense against illegal aliens. This is called the "line watch." The line watch consists of agents being placed immediately upon and in the near vicinity of the physical international boundary. In the fiscal year 1973 (July 1, 1972, to June 30, 1973), there were approximately 90 agents assigned to the line watch along the international boundary of our country with the Republic of Mexico from Brownsville to Falcon Dam near Roma, Texas, a distance of approximately 150 highway miles or 225-250 river miles. During such period,

they apprehended 8,114 illegal aliens. But, the line watch is inadequately manned and so many illegal aliens evade detection. After crossing the line watch, some illegal aliens seek employment in the Rio Grande Valley area; however, a large number of illegal aliens travel toward the interior of the State of Texas and of this nation.

In addition to those aliens who illegally cross the border into the United States, many aliens legally enter the United States via temporary "border passes" such as I-186 cards (issued to residents of Mexico), which authorize the holder to travel within an area no farther than 25 mile from the border and for a period of time not to exceed 72 hours. See C.F.R., § 212.6. These aliens are legally here so long as they observe the limits of their authorization. But, many travel northward and by the time they have traveled into Kenedy County on U.S. Highway 77, or have passed San Manuel, Texas, on U.S. Highway 281, they are illegal.

The secondary border defense against the flow of illegal aliens into the United States is made up of traffic-inspection facilities, being the several checkpoints located on highways leading away from the international border. The purpose of the checkpoints is to provide a means by which the Border Patrol can question occupants traveling northerly along these main arteries as to their citizenship and to determine their right to be, or to remain, in the United States; and, also, to search for any illegal aliens that might be hidden within the vehicle involved. By doing so, the Border Patrol is able to intercept vehicles or conveyances transporting illegal aliens, apprehend the illegal aliens and their smugglers, and to halt those nonresident aliens admitted with temporary

border-passing cards (Form I-186) who have traveled beyond the limits of their authority.

The Border Patrol, in the selection of a checkpoint location, takes into account the following factors, to wit:

(a) The amount of vehicular traffic. The checkpoints are placed beyond the confluence of two or more roads originating at or near the border in order to check a large amount of traffic with a minimum number of officers. This also avoids the inconvenience of repeated checking of commuter or urban traffic which necessarily would occur if sites were operated within the network of roads leading from and through the more populated areas of the Lower Rio Grande Valley.

(b) Terrain and topography. Checkpoints are located in areas that restrict passage of vehicles around them. For instance, ranch country with brush for cover and where there are long stretches without public road access.

(c) Safety of the public. It is wise to establish points where an unobstructed view of oncoming traffic is available in order to provide a safe distance for slowing and stopping and off-highway parking.

(d) Distance from the border. Since a point within twenty-five (25) miles of the border would not control the unlawful movement of the Form I-186, nonresident, border crosser, the checkpoints need to be located beyond such distance from the border.

The Border Patrol officers, while operating the checkpoints, are in uniform. They stand at the "point" in full sight of the oncoming northbound traffic on the highway. The oncoming vehicular traffic has been warned to slow down by signs along the highway and is directed, by bright-colored cones, to the point on the highway where the officer is standing. The vehicles will observe those in the vehicle and, based upon his experience, makes a decision as to whether he believes any occupant is an alien (i.e., "breaks the pattern" of usual traffic). If so, the vehicle will be stopped. Otherwise, he may exchange salutations or merely wave the vehicle through the checkpoint. The ability to make such instant determination was questioned by cross-examination. The government witnesses explained there were a number of things taken into account, such as whether the vehicle appeared to be heavily loaded, the general appearance of the occupants and whether they seem to fit the vehicle. The Court believes that these men, experienced in this area, can develop a feel or an ability to react to appearance and demeanor so as to make judgment without having to "a", "b", "c" the reasons for such judgment. The Court concludes the officers are competent to make a decision as to whom should be stopped or waved on, and are justified in doing so.

Approximately eighty-five percent (85%) of the vehicles which arrive at the Border Patrol checkpoints are either waved through, as are local or commuter traffic whose occupants are known or recognized, or, if unknown, stopped no longer than three to five seconds, in order for the citizenship of the occupants to be checked. Of the remaining approximately fifteen percent (15%) of vehicular traffic passing through the checkpoints, the

vast majority of the vehicles are detained for only two to three minutes, while Border Patrol agents question the occupants of the vehicles more extensively as to their citizenship and their rights to be in the United States. Only a very small percent (perhaps two percent (2%) of said fifteen percent (15%)) of the vehicles may be directed off the highway for "secondary inspection" and more detailed questioning of the occupants as to citizenship and their right to be in the United States. If, after questioning the occupants, the agent then believes the illegal aliens may be secreted in the vehicle (because of a break in the "pattern" indicating the possibility of smuggling), he will make cursory visual inspection of those areas of the vehicle not visible from the outside, such as in the trunk, the interior portion of camper, and the like. There is no evidence as to how many of the vehicles which are secondarily inspected are found to have no illegal aliens or other contraband.

In addition to the large number of apprehensions made at the checkpoints each year, a very good reason for their operations at locations on the major routes north from the border is the fact that they effectively deter large numbers of aliens from illegally entering the country or violating the terms of any temporary crossing card they may have. The deterrent aspect of these traffic checkpoint operations is amply demonstrated by the fact that frequently the illegal aliens have to resort to the employment of professional smugglers in order to obtain transportation around or through these checkpoints.

As a part of the checkpoint system in use by the Border Patrol are the checkpoints in the vicinity of Sarita and Falfurrias on U. S. Highways 77 and 281. The Corpus

Christi Division of the Southern District of Texas has venue of the cases which arise from apprehensions at these two points. So, we must be more specific as to them. The geographical area in the vicinity of these two checkpoints consists of coastal plains covered with trees and brush. Large ranch operations control the areas on each side of these highways. No public roads are available to bypass these checkpoints. Ranch roads which could possibly be used to bypass these checkpoints have locked gates and are not available to the travelling public. They, in effect, supplement each other, but the only thing we need to mention now about Falfurrias is that there have been three permanent checkpoint locations south of Falfurrias in Brooks County, Texas.

However, it is important to show that, as a part of the checkpoint system, there are, in addition to the Sarita and Falfurrias checkpoints, the following Border Patrol checkpoints maintained in the Southern Judicial District of Texas:

> (a) A checkpoint is located 7.8 miles northwest of La Gloria, Texas, on Farm-to-Market Road 1017. It is forty-two (42) highway miles and approximately thirty-two (32) air miles from the Mexican border. Portable equipment is used at this checkpoint and electricity for floodlights is furnished by an auxiliary generator. North-bound traffic is checked sixteen (16) hours per day when sufficient manpower is available and weather permits. The area consists of rolling hills, brush and trees, and is primarily used for cattle ranching.
>
> (b) Additional checkpoints are located in the Laredo sector of the United States Border Patrol.

> These checkpoints are located on Interstate Highway 35, eleven and four-tenths (11.4) miles from the port of entry, Laredo, Texas; on Highway 59, twenty-three (23) road miles and forty-eight (48) road miles northeast of Laredo, Texas, on State Highway 359, forty-eight (48) road miles east of Laredo, Texas, on State Highway 16 and Farm-to-Market Road 649, two (2) road miles south of Hebbronville, Texas.

The foregoing sets forth the Court's findings regarding the checkpoint system used by the Border Patrol in the South Texas area to control the entry of illegal aliens into this country and the traffic in llegal aliens on this side of the border, and the location of the checkpoints and the reasons for their existence.

Now we must review the evidence as to the apprehension of this Defendant. It occurred at the checkpoint five (5) miles south of Sarita, Texas. At the time of the offense charged in this case, there were two (2) checkpoints on U. S. Highway 77 south of Sarita. The United States Border Patrol moved from time to time from one such location to another. The reason for the movement from one checkpoint to another was to confuse the illegal aliens and the alien smugglers moving north from the border. All of these checkpoints were well north of the last side roads leading from the border entering U. S. Highway 77, and at each one there were permanent installations. There was no way anyone, illegal or not, could drive around any of these checkpoints. The northernmost location approximately five (5) miles south of Sarita, Texas, is approximately eighty-five (85) highway miles and less than that distance by air from

the most direct point on the Mexican border. The northern location is situated approximately five (5) miles south of Sarita. The southernmost location is situated approximately twelve (12) miles south of Sarita. The 5-mile checkpoint has been, over the years, the site of the detection and detention of innumerable illegal aliens entering this country from Mexico. Since the Defendant was arrested there, reference to the Sarita checkpoint shall hereafter be to the 5-mile location.

The search at the Sarita checkpoint took place about eighty-five (85) miles north from the international boundary between the Republic of Mexico and the United States. Immigration officials are authorized, when acting under 8 U.S.C., §§ 1225, 1357; 8 C.F.R., § 287.1, to stop and investigate vehicles for concealed aliens within one hundred (100) air miles from any external boundary without a showing of probable cause if there is reasonable suspicion of illegally entered aliens. Once a vehicle has been stopped pursuant to an authorized check, the agents were empowered to examine the vehicle, including the trunk and other places where an alien might be concealed, for aliens. It is not necessary for the car searched to have crossed the border. Aliens obviously must have crossed the border, even though it may be difficult, even impossible, to prove exactly how. This is also true of those card carriers who have gone beyond the authority granted to them.

The Sarita checkpoint is well north, perhaps forty-five (45) miles or more, of where State Highway 186, which originates at San Manuel, intersects U. S. Highway 77 at Raymondville, Texas. State Highway 186 continues on eastward to Port Mansfield. There is no public access to U. S. Highway 77 for a distance of approximately

fifty (50) miles south of Sarita, and north of Sarita for a distance of six (6) miles.

This Sarita checkpoint was, at the time of the offense, and presently is, permanent. While this memorandum will relate to the time of the offense, we again wish to mention that, after mid-August, 1973, the 5-mile checkpoint has been the only one in use on U.S. Highway 77. There had been no change in the nature of the operation, and conditions remained the same up to the date of the suppression hearing. There was, at this particular location, a permanent sign which could be folded, electrical outlets or drops so that lights could be used at night and warning signals and radios be operated, and a telephone hookup. There was no permanent building at the point, but there was a large mobile van, marked with a Border Patrol emblem, which was hooked to the permanent installations when on duty, with floodlights on the top front which illuminate the area at night. There was a concrete strip on which it was parked off the highway. This van served as an office and also contained radio and telephone equipment. There was a so-called "chase" car, marked with a Border Patrol emblem and equipped with a siren and red lights, available while the point was in operation. Also, there was a paved apron on the right-hand shoulder of the northbound lane of U.S. Highway 77, which was used for secondary inspections. There was testimony elicited that the apron was on a state highway easement, and the Defendant, by cross-examination, attacked the government's right to use the state highway easement for the border search activities. This contention has no merit. The northbound traffic was checked here twenty-four (24) hours each day, except when inclement weather made stopping traffic dangerous to the general public.

The first indication to the traveling public approaching from the south that there was a checkpoint ahead was a permanent Texas Highway Department sign located approximately seven hundred (700) yards south of the checkpoint, which read "SLOW" and "DIM LIGHTS." At night, this sign was illuminated by yellow, flashing lights. Approximately five hundred (500) yards south of the checkpoint was located another permanent Texas Highway Department sign, which read "STOP AHEAD." At night, this sign, likewise, had flashing, yellow lights. Approximately two hundred (200) yards south of the checkpoint was located a third permanent Texas Highway Department sign, also reading "STOP AHEAD." At night, this sign also had flashing, yellow lights. At the checkpoint site there was located another permanent Texas Highway Department sign, reading "STOP," and a sign reading "U.S. OFFICERS." This "STOP" sign had a red, flashing light affixed to it.

Approximately fifty (50) yards north and south of the checkpoint site, traffic cones were spaced at intervals of ten (10) to twenty (20) yards in the center of the highway. At the checkpoint itself, four (4) to five (5) traffic cones were positioned on the paved apron and perpendicular to the highway.

For the protection of the vehicles approaching the checkpoint from the north heading south, the Texas Highway Department had erected illuminated signs, reading "SLOW," "SLOW DANGER," and "DO NOT PASS," which were approximately two hundred fifty (250) yards north of the checkpoint.

The permanent signs just described were folded down when the checkpoint was not in operation due to inclement weather or when the checkpoint was being operated at one of the other locations. Certain photographs, and the notations thereon, which were admitted in evidence bearing identification as government's Exhibits 1 through 6 reflect the conditions surrounding the checkpoint here involved. There is further identifying information on each picture.

The area immediately north of the boundary between this country and Mexico was, and still is, thickly populated. It encompasses Cameron, Willacy, Hidalgo, and Starr Counties. At the time this Defendant was arrested, there were several hundred thousand residents in the total area, frequently referred to as the Lower Rio Grande Valley. The locations of the highways and roads are the same now as in early 1973. U.S. Highway 83 runs from Brownsville through Harlingen to McAllen, Mission, and on to Rio Grande City. Highway 77 goes north from Harlingen through Willacy County and Kenedy County to Kingsville, Texas, and beyond; U.S. Highway 281 runs from Brownsville, three (3) to five (5) miles from the border, westerly to within a few miles of the port of entry at Hidalgo, then turns north through Pharr, which is just east of McAllen, Texas, and northerly through Edinburg to Falfurrias, which is in Brooks County. There are numerous farm-to-market roads throughout the Valley south of State Highway 186 from San Manuel to Port Mansfield. The Court takes judicial notice that the portion of the Official Highway Travel Map covering this area, prepared by the Texas Highway Department, is reasonably accurate, particularly as to the location of roads and the mileage shown. A copy of such map is made a part of the record in this case at the direction of the Court. The trade relations between

the Lower Rio Grande Valley area and Corpus Christi and to the north have been, during recent years, considerable.

The Official District Highway Traffic Map prepared by the Texas Highway Department in cooperation with the United States Department of Transportation shows the traffic on U.S. Highway 77 near the location of the Sarita checkpoint, based upon an annual average over a 24-hour period, to be approximately 3,410 cars, traveling both north and south. So, it is reasonable to say that approximately 1,705 vehicles were going north past the checkpoint each day and were subject to being stopped for a routine inspection check.

There are, of course, ports of entry at Brownsville, Progresso, Hidalgo, and across from Rio Grande City, but the banks of the river over such distance are generally unprotected. It is an accepted fact that, while apprehensions of illegal aliens and of narcotics at the ports of entry are made, the bulk of the illegal alien traffic, as well as the narcotic traffic, does not come through a port of entry, but, rather, entrance to the country is gained by wading or boating across the Rio Grande River.

It has been the custom for the Border Patrol officers to patrol the area south of Sarita for many years. A full-time check was commenced about 1942 on U.S. Highway 77, and it has operated continuously since then. The need for the maintenance of the permanent checkpoint here involved, and the other checkpoint with permanent facilities located approximately twelve (12) miles south of Sarita, on U.S. Highway 77, is reflected in the count of apprehensions, commencing for the fiscal year 1971 until and including the fiscal year 1973.

APPREHENSIONS

(Each fiscal year ends on June 30th)

	FY 71 7/1/70- 6/30/71	FY 72 7/1/71- 6/30/72	FY 73 7/1/72- 6/30/73
Aliens	2,361	2,468	2,622
Alien Smugglers	49	43	70
Marihuana (Pounds)	27	1,481	12,834
Persons Arrested for Narcotics	19	41	159

Government's Exhibit 7 supports such figures and gives considerably more detail as to the number and type of apprehensions. Exhibit 7 contains information kept by the Immigration Service in the general course of its operations, and, although the method of proving the record did not fully conform to the evidentiary rule regarding the introduction of business records, the Court felt there was no necessity for the strict application of such rule to this particular evidence.

It has previously been explained that two sites have been utilized to check traffic in the area south of Sarita on U.S. Highway 77, and three sites have been utilized in the area below Falfurrias, on U.S. Highway 281. The checkpoint is, of course, set up in only one location at a time, that is, one site on U.S. Highway 281 and one site on U.S. Highway 77. The bi-weekly schedule designating which site would be utilized on which days has been prepared in advance by the Patrol agent in charge of the station and not by the Border Patrol agents who actually man the checkpoint.

Now we come to the facts as they happened at the checkpoint as this Defendant drove toward it on the night in question. The vehicle approached the checkpoint, which was located five (5) miles below Sarita, and fully equipped as above described, and as it did so, it slowed down and then stopped at the point where a Border Patrol officer, in full uniform, was standing. The Border Patrol officer had no advance information as to the vehicle or this Defendant, but stopped the car for a routine inspection. Defendant Jose Asencion Garcia was the driver of the vehicle. There was no one with him. The officer determined the occupant was a citizen of the United States. The officer further testified that the Defendant appeared nervous and he asked him to pull the car over and off the right side of the highway to the concrete ramp for a secondary inspection. When requested by the officer to open the trunk of the vehicle, the Defendant did so. The officer testified that at this time he was looking for illegal aliens. However, when he looked into the trunk, while he saw no aliens, he did see, in plain sight, what appeared to be well-wrapped bricks of marihuana in an open box, and he smelled what he thought to be the odor of marihuana. After seeing the bricks of marihuana and smelling the odor, the officer arrested Defendant and read his rights, as required under the *Miranda* decision.

The Defendant, by cross-examination, attempted to make an issue of the fact that many Mexican-Americans are stopped, with the intent to raise a constitutional question of discrimination. This line of questioning was ineffective because of the large Mexican-American population, over fifty percent (50%), in the Rio Grande Valley. The motion of Defendant that the method of handling

the checkpoint was unconstitutional was denied. We find the facts as to the inspection and search to be as above set forth.

Immediately after the arrest, Customs officials were called. When the Customs officers arrived, the *Miranda* rights were again read to the Defendant. Thereafter, according to the Customs officer, the Defendant first told a story of driving from Pearsall to the Valley and was then on his way to Richmond, Texas. Then he changed his story and admitted he had gone to the Valley to pick up the marihuana and to haul it north and he was to be paid $500.00 for the trip.

At the time the government rested, the Court considered the motions of Defendant to suppress the evidence. It took into account all the evidence presented. The motion was denied. Consequently, the evidence regarding what happened at the checkpoint, the search and seizure, and the marihuana, was properly admitted into evidence. The Defendant, in open court, excepted to that ruling. The Defendant then recalled government witness for further cross-examination, and then rested. Both the government and the Defendant then closed.

The Court announced it would prepare findings of fact and conclusions of law regarding the motion to suppress, and the foregoing constitutes such findings of fact. The Court further concluded that, as a matter of law, the search here involved was a true border search or the functional equivalent thereof, and thus was legally made and the seizures valid. The Court then considered all of the testimony regarding the search, the seizure, and the contraband, as being properly in evidence, and it has decided that all of the evidence before this Court

established beyond a reasonable doubt that Defendant, Jose Asencion Garcia, was guilty as charged in the indictment; and the Court so finds.

This Court is fully aware of *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), and *United States v. Miller,* 492 F.2d 37 (5th Cir. 1974). The violations which are the basis of this suit occurred prior to the decision of the Supreme Court of the United States in *Almeida-Sanchez.* The Court of Appeals for the Fifth Circuit has said in *Miller* that the *Almeida-Sanchez* decision is not to be applied retroactively; we do not have to worry about it here. This being the case, and since the search was made at a point which was a functional equivalent of the border, the Court concludes the search was valid. *United States v. Wright,* 476 F.2d 1027 (5th Cir. 1973); *United States v. Thompson,* 475 F.2d 1359 (5th Cir. 1972); *United States v. McDaniel,* 463 F.2d 1359 (5th Cir. 1972); *United States v. DeLeon,* 462 F.2d 170 (5th Cir. 1972).

The foregoing constitutes the findings of fact and the conclusion of law of this Court upon which the Court based its denial of the motion to suppress filed by the Defendant herein and its finding that the Defendant, Jose Asencion Garcia, was guilty of possessing with intent to distribute approximately one hundred seventy-six (176) pounds of marihuana, as charged in the indictment. A copy of this order shall be furnished counsel for the government and for the Defendant.

SIGNED this 29th day of July, 1974.

/s/ OWEN D. COX
United States District Judge

Court's Exhibit "B"

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

CR. NO. 72-C-62

UNITED STATES OF AMERICA

v.

JOSE ASENCION GARCIA

SUPPLEMENTAL FINDINGS OF FACT
AND CONCLUSIONS OF LAW

The Court's order in this case dated the 29th day of July, 1974, set forth extended findings of fact and conclusions of law regarding the Sarita "checkpoint" south of the city of Sarita, Texas, on U.S. Highway 77. That order has been reviewed and the Court, being concerned that certain phases of the operations of the Sarita checkpoint may not have been adequately covered, has decided to add to what has previously been said. This District Court believes the additional discussion is needed, or so it seems, because the Court of Appeals, in recent opinions, has not recognized that the checkpoint operations are purely and simply there for the purpose of apprehending illegal aliens and smugglers of illegal aliens. The checkpoint is manned by the Border Patrol, which is a part of the Immigration and Naturalization Service of the United States Department of Justice.

The illegal aliens apprehended at these checkpoints, on the average, are either sent back to Mexico or handled

by United States magistrates along the border. The Court's July 29th order indicates the number of illegal aliens handled each year to be sizeable. But, very few aliens, other than the smugglers, ever appear in the United States District Court for trial. However, those cases originating at checkpoints involving the apprehension of persons dealing in, one way or another, marihuana, heroin, cocaine, and other controlled substances, frequently reach the Court of Appeals. These cases are made after the initial investigation for illegal aliens is concluded. Consequently, the only issue which has been raised before the Court of Appeals recently concerns the validity or invalidity of a search for and seizure of controlled substances after the vehicle coming to the checkpoint has been stopped and has been first searched for illegal aliens. Such a controlled-substance search and seizure comes about after the Border patrolman involved has changed his hat and becomes a Customs agent, as is permitted under *United States v. McDaniel,* 463 F.2d 129 (5th Cir. 1972); *United States v. Thompson,* 475 F.2d 1359 (5th Cir. 1973).

The basic question here is whether the Border Patrol, in its attempt to stem the flow of illegal aliens into this country, can, without reasonable suspicion, stop a vehicle proceeding north, at the checkpoint, and require the occupants to announce their citizenship. This is done, of course, consistently at the ports of entry along the Rio Grande River, which is the international boundary between the Republic of Mexico and the United States. There is nothing illegal about such action. *Carroll v. United States,* 267 U.S. 132, 154; *Almeida-Sanchez v. United States,* 413 U.S. 269, 272. But, we need to get an answer to the question of whether the Immigration

officials are entitled to stop vehicles on a major highway at a point 70 or 80 miles north of the border and a long way from nowhere in ranch land terrain, as has been previously described in the July 29th order. Also, there are vast areas of sparsely populated land between ports of entry along the Mexican border which, because of the limited personnel available, cannot be adequately manned. Wading is no problem, nor is floating. So, illegal entry into the United States is not difficult.

Further, many aliens have special permits which allow them to legally cross the border and legally remain within twenty-five miles of the border during their stay in this country. These initially legal aliens can move north without interference, in violation of the authority given them, unless by use of the checkpoints their movements can be halted. Based upon the location and the physical layout of the checkpoint, the Court concludes it was a functional equivalent of the border.

The reasonable suspicion that warrants a further search for aliens only becomes important after the initial stop and inquiry as to citizenship. Thereafter, even though no illegal aliens are apprehended, things may have occurred while the search for aliens was in progress which satisfy a probable-cause requirement before a further investigation is made. If, as the car stops, the Border patrolman, before or as he inquires as to the citizenship of the driver and others in the car, smells what he considers to be the odor of marihuana emanating from the automobile, he does not have to ignore it. He certainly could continue his search for aliens and, at the same time, change hats and become a Customs official. Also, the smell of marihuana may not be the only thing that indicates a further

investigation should be made. Sometimes the physical situation within the automobile is such as to indicate to the officer, based on his past experience, that probable cause exists for a search for any controlled substance in the vehicle. Under these circumstances, this Court concludes that, as a matter of law, the search is a valid search and any contraband seized should be admitted in evidence on the trial of the case.

A copy of this supplemental memorandum shall be furnished counsel for the government and the Defendants.

SIGNED this 12th day of September, 1974.

/s/ OWEN D. COX
United States District Judge

Court's Exhibit "C"

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

C-77-252

UNITED STATES OF AMERICA

v.

STEVEN WAYNE CLAY

MEMORANDUM AND ORDER

Defendant Steven Wayne Clay was charged in this case by indictment with possession with intent to distribute approximately 103 pounds of marihuana. Defendant waived a jury and the case was called for nonjury trial on December 19, 1977. Defendant filed a timely motion to suppress. This motion was carried along with the trial. At the conclusion of evidence, the Court announced that the motion was overruled and found the Defendant guilty of the offense charged in the indictment. At that time the Court stated that a memorandum would be filed setting out detailed findings and conclusions and the reasons for the Court's ruling; that is the purpose of this memorandum and order.

Since this case is a so-called checkpoint case involving the immigration checkpoint south of Sarita, Texas, prior to the presentation of evidence the Court took judicial notice of the location, justification and other physical aspects of said Sarita checkpoint, and signed an order

putting into the record as evidence Court's Exhibits "A" and "B," being orders of this Court filed on July 30 and September 12, 1974, in *United States of America v. Jose Ascencion Garcia,* Cr. No. 72-C-62, in the District Court for the Southern District of Texas, Corpus Christi Division. These orders made detailed findings of fact concerning said Sarita, Texas, checkpoint at the time said above-described orders were signed.

The facts which were judicially noticed are subject to and revised by certain changes in the Sarita checkpoint as to its location and permanence. Officer Charles H. McClure, who has been employed by the United States Border Patrol for twelve years, was called to testify concerning the change in location of the Sarita checkpoint since the *Garcia* case. McClure testified that he has worked at both the old location, five miles south of Sarita, Texas, and the new location, approximately fourteen miles south of Sarita, Texas. The checkpoint was moved by the Border Patrol because the Texas Highway Department widened Highway 77 to accommodate four lanes of traffic at the old checkpoint location. In addition, the Highway Department constructed a new roadside park near the old location.

McClure testified that there are no intersecting roads or communities between the present and former checkpoint locations. The terrain is the same at both locations. The only changes in the checkpoint were improved physical facilities for the Border Patrol. While the old checkpoint facility was a mobile van, the new location has a 50-foot trailer resting on concrete blocks. The trailer's wheels have been removed and the trailer is "tied down" to protect it from high winds. The new checkpoint location has an improved lighting system, better telephone

facilities, more adequate sanitary facilities, and a better holding cell for prisoners. Other than these changes, Officer McClure testified that the old and new checkpoint locations are the same.

The Court finds that on or about the 13th day of October, 1977, Michael D. Hughes, a United States Border Patrol Officer, was working the permanent alien checkpoint 14 miles below Sarita, Texas, when a Chevrolet Monte Carlo, driven by Defendant Clay, and also occupied by John E. Cutts, approached the checkpoint. As they approached the checkpoint, Cutts was waving to Officer Hughes and shouting, "Hello, Officer." Officer Hughes testifiied that both men appeared highly nervous and were "overly friendly." Hughes asked the men where they were going and they answered simultaneously; one stated Louisiana and the other stated Mississippi. Hughes observed two or three suitcases, an ice chest, and other personal belongings on the back seat of the car. Hughes testified that such items are normally carried in the trunk. Hughes then asked Defendant Clay if he could look in the trunk. Clay got out of the car and opened and closed the trunk before Hughes had a chance to get to the rear of the car. The officer testified that he became "really suspicious" at this point and once again asked the Defendant Clay to open the trunk. When the Defendant complied, Hughes found what proved to be 103 pounds of marihuana. Clay was arrested and the Drug Enforcement Administration (DEA) was called in to take the Defendant into custody.

Special Agent Daniel Buckley of the DEA took Clay into custody and read him his constitutional rights as required by the *Miranda* decision. While enroute from the

checkpoint to Corpus Christi, Texas, Clay told Buckley how he had become involved in transporting the marihuana. Clay said that he met someone in a bar in Mississippi who offered him $800.00 to drive to Harlingen, Texas, pick up the marihuana and then drive it back to Mississippi.

The Court concludes that the Defendant's Fourth Amendment right to be free from unreasonable searches and seizures was not violated by the actions of Border Patrol Officer Hughes. There now appears to be no doubt that this officer had the right to stop the vehicle driven by Defendant Clay and to inquire as to his citizenship. *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976).

The nervousness of the Defendant and Cutts, along with their suspicious actions, gave Officer Hughes probable cause to search. It also appears from the uncontradicted testimony that the search was consensual.

The Sarita, Texas, checkpoint here involved is substantially similar to the Sarita, Texas, checkpoint involved in *Sifuentes,* the companion case to *Martinez-Fuerte, supra.* In that case, the Defendant Sifuentes was the driver of a car containing four passengers. He was stopped at the checkpoint and inquiry as to citizenship was made. All four passengers were illegal aliens, and Sifuentes was charged with four counts of illegally transporting aliens. The rationale of the United States Supreme Court in holding that stops at these checkpoints for the purpose of inquiry as to citizenship revolved around a balancing test of rights under the Fourth Amendment versus the government interest in preventing illegal alien entry. The Court stated: "[w]hile the need

to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interest is quite limited." *Martinez-Fuerte, supra,* at 14. "[W]e hold that stops for a brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant." *Id.* at 22.

Also, we point out that since probable cause has been established, the exigencies of the circumstances were such that the search here involved, made without the benefit of a warrant, was not unreasonable under the Fourth Amendment of the United States Constitution and thus the search was valid.

There is another justification for sustaining the validity of the search made by the Border Patrol agent in this case besides the above-cited recent United States Supreme Court decision. On numerous prior occasions, and as it did in this case, the Court has taken judicial notice of the location, justification and other physical aspects of the Sarita, Texas, checkpoint and has concluded such facts do establish that the permanent alien checkpoint near Sarita, Texas, constitutes a functional equivalent of the border. *See United States v. Rodriguez,* 537 F.2d 120 (5th Cir. 1976). There are similar checkpoints near Sierra Blanca, Texas, and near La Gloria, Texas, each of which has been held to be a functional equivalent of the border. *United States v. Hart,* 506 F.2d 887, 895-897 (5th Cir.), vacated and remanded, 422 U.S. 1053, affirmed 525 F.2d 1199 (5th Cir. 1976); *United States v. Fuentes,* 379 F. Supp. 1145 (S.D. Tex. 1974), affirmed 517 F.2d 1401 (5th Cir. 1975); *United States v. Gonzales-Alvarez,* 528 F.2d 1056 (5th Cir. 1976, No. 75-3537, Summary Calendar). Therefore, a "non-

probable cause search" made at a point that is the functional equivalent of the border can be a "valid border search which [meets] the Fourth Amendment requirement of reasonableness." *See Hart, supra.*

While the Border Patrol agent may not have had the authority to search the Defendant Clay under the immigration laws of the United States, he was empowered under the circumstances to conduct a search pursuant to the authority of the customs laws. The Fifth Circuit has discussed this dual role of Border Patrol agents in *United States v. McDaniel,* 463 F.2d 129 (1972). "It appears that Border Patrol agents wear two hats, one as an immigration officer and the other as a customs officer." *McDaniel, supra,* at 134. *United States v. Bird,* 456 F.2d 1023 (5th Cir. 1972); and *United States v. Maggard,* 451 F.2d 503 (5th Cir. 1971). Under all the circumstances, the search of the vehicle was reasonable under the customs and immigration laws and within the otherwise stricter confines of the Fourth Amendment.

The parties in this case stipulated to the chain of custody of the contraband and that the substance involved was marihuana. The Court concludes that the quantity of marihuana involved, and the voluntary statement made by the Defendant after he received his *Miranda* warnings, warrant a finding that the Defendant possessed this quantity of marihuana with intent to distribute it.

Based upon the evidence in this case, the Court found the Defendant guilty, beyond reasonable doubt, of the offense charged in the indictment.

The Defendant Clay is ordered to appear before this Court for sentencing on the 30th day of January, 1978, at 1:30 o'clock p.m. The Court has ordered a presentence investigation as to this Defendant.

The bail of this Defendant shall continue in effect until the date for sentencing above set for this Court.

SIGNED this 20th day of December, 1977.

/s/ OWEN D. COX
United States District Judge

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. _____

ELVIA ESCAMILLA MORENO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of November, 1978, three copies of the Petition for Writ of Certiorari were mailed postage prepaid, to Hon. Wade H. McCree, Jr., Esq., Solicitor-General of the United States, Department of Justice, Washington, D.C., Counsel for the Respondent. I further certify that all parties required to be served have been served.

ROY BEENE
914 Main, Suite 1101
Houston, Texas 77002
Counsel for Petitioner

No. 78-784

In the Supreme Court of the United States

OCTOBER TERM, 1978

ELVIA ESCAMILLA MORENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-784

ELVIA ESCAMILLA MORENO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the courts below erred in concluding that the search of petitioner was conducted at a "functional equivalent of the border." She also contends that the evidence was insufficient to support her conviction.

1. After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). She was sentenced to four years' imprisonment, to be followed by a special parole term of three years. The court of appeals affirmed (Pet. App. 22-24; 579 F. 2d 371).

The evidence at trial showed that petitioner was stopped by a Border Patrol agent at a permanent checkpoint located 14 miles south of Sarita, Texas, on U.S. Highway 77, a major highway leading north from the Lower Rio Grande Valley (Pet. App. 22, 50; Tr. 22).

The agent noticed that petitioner and her passenger appeared nervous, and asked them to proceed to a secondary inspection area. The agent then observed a flange with a screw on both sides of the rear bumper of petitioner's truck, and, upon looking underneath the truck, he saw two hinges directly behind the bumper, some indications of welding, and a compartment under the bed of the truck (*ibid.*). He had previously seen similar compartments used to transport marijuana through the checkpoint (Tr. 28). After lifting the bed of the truck, the agent discovered 189 pounds of marijuana (Pet. App. 22). A DEA agent testified at trial that petitioner told him she had been paid $200 to drive the truck to Houston (*ibid.*).

2. Petitioner contends (Pet. 8-13) that the Sarita checkpoint is not located at a "functional equivalent of the border" and that therefore the Border Patrol agent was not authorized to search the truck compartment in which the marijuana was found. However, the factual determination by both lower courts that the Sarita checkpoint is the functional equivalent of the border does not warrant further review by this Court. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967).[1]

Petitioner also argues (Pet. 10-13) that the decision here conflicts with decisions of the Ninth and Tenth Circuits that immigration checkpoints located away from true borders cannot be the functional equivalent of the border (see Pet. 12). But neither circuit has made any such categorical ruling. Instead, the Ninth Circuit has indicated that a checkpoint located away from the border can be

[1]The district court took "judicial notice of the location, justification and other physical aspects" of the Sarita checkpoint, as it had determined them in other criminal proceedings (Pet. App. 25, referring to Pet App. 27-55). See Fed. R. Evid. 201. On appeal, the court of appeals relied (Pet. App. 23) on its prior determination in *United States* v. *Reyna,* 572 F. 2d 515, 517-518 (5th Cir. 1978), that the Sarita checkpoint is the functional equivalent of the border.

the functional equivalent of the border provided that it is not at a place where "[a] significant number of those stopped are domestic travelers." *United States* v. *Bowen,* 500 F. 2d 960, 965-967 (9th Cir. 1974), aff'd, 422 U.S. 916 (1975).[2] This standard is substantially the same as the Fifth Circuit's rule that a checkpoint may be the functional equivalent of the border if, among other criteria, "the percentage of domestic traffic" does not "approach[ ] a majority." *United States* v. *Alvarez-Gonzalez,* 542 F. 2d 226, 229 (5th Cir. 1976).[3]

The difference in result in this case and in *Bowen* is attributable to the differing characteristics of the checkpoints, not to disagreements in principle. In *Bowen,* the Ninth Circuit "had no reason to believe that virtually all or even most of the cars passing through" the checkpoint had crossed the border (500 F. 2d at 966), while here the court held that the percentage of domestic travel at Sarita does not "approach the majority" (Pet. App. 23, citing *United States* v. *Reyna,* 572 F. 2d 515, 517 (5th Cir. 1978)).[4]

[2]The Tenth Circuit decisions cited by petitioner (Pet. 11-12) (*United States* v. *Maddox,* 485 F. 2d 361 (1973) and *United States* v. *King,* 485 F. 2d 353 (1973)) do not attempt to define the functional equivalent of a border search. The court simply remanded these cases for a determination of whether the checkpoint at Truth or Consequences, New Mexico, 98 miles from the border, was such an equivalent.

[3]Petitioner also relies (Pet. 10, 12) on *United States* v. *Escalante,* 554 F. 2d 970 (9th Cir. 1977) and *United States* v. *Juarez-Rodriguez,* 568 F. 2d 120 (9th Cir. 1977) to demonstrate a conflict with this case. But those decisions did not find it necessary discuss whether the San Clemente checkpoint at issue there was the functional equivalent of the border, since that issue had already been conceded by the government in *United States* v. *Ortiz,* 422 U.S. 891, 892 (1975).

[4]Contrary to petitioner's claim (Pet. 12-13), *Reyna,* on which the court below relied, explicitly followed prior Fifth Circuit precedent (*United States* v. *Alvarez-Gonzalez, supra)* in deciding whether Sarita is the functional equivalent of the border. See 572 F. 2d at 517.

3. Petitioner contends (Pet. 14-16) that the evidence was insufficient to show that she possessed the marijuana found in the truck. But the government's evidence showed not just that she was driving the car and that the marijuana was secreted in the body of the car, rather than in a passenger's belongings over which she might have limited control, but also that she admitted to receiving $200 to drive the truck. As the court below held, "the jury was justified in disbelieving [petitioner's] claim of ignorance * * *. Any conflicts in the evidence must be resolved in favor of the jury verdict" (Pet. App. 24).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

DOJ-1979-01

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-784

ELVIA ESCAMILLA MORENO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-784

ELVIA ESCAMILLA MORENO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR REHEARING AFTER DENIAL OF CERTIORARI

The Petitioner, Elvia Escamilla Moreno respectfully prays that the Supreme Court reconsider its decision dated February 20, 1979 denying her Petition for Writ of Certiorari to the Court of Appeals for the Fifth Circuit.

In support thereof, Petitioner would respectfully show unto the Court that a new and conflicting decision has been handed down by another court of appeals. The Ninth Circuit has once again reiterated its prior holdings that

> A checkpoint stop for brief questioning is lawful, but subsequent searches of the vehicle may be undertaken only, if supported by probable cause or

if proper consent for the search has been given. *United States v. Rubalcava-Montoya*, No. 77-3405, 9th Cir., August 22, 1978 (unreported). (A copy of the full opinion is made a part hereof as Appendix A.)

In the case presently at bar the Government did not contend that there was either probable cause or consent for this search of a vehicle at a checkpoint more than seventy miles inland from the true international border. Nor did the trial court or the court of appeals below reply upon such rationale in upholding the search of Petitioner's vehicle.

Under the present contrary holdings, citizens are safe from baseless and unreasonable searches of their vehicles at a checkpoint in California but not in Texas. Indeed the Fifth Circuit has held that inland border patrol checkpoints are the functional equivalent of the border and thereby exempt from the Fourth Amendment.

These conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a rehearing should be granted and a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

ROY BEENE
914 Main, Suite 1101
Houston, Texas 77002
Counsel for Petitioner

CERTIFICATE

This petition for rehearing is presented in good faith and not for delay and this petition is restricted to the grounds specified in Rule 58, Rules of the Supreme Court.

ROY BEENE
Counsel for Petitioner

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SANTOS RUBALCAVA-MONTOYA,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTONIO SERRATO-BALTAZAR,
Defendant-Appellant.

NOS. 77-3405, 77-3406.

UNITED STATES COURT OF APPEALS,

Ninth Circuit.

August 22, 1978.

Appeal from the United States District Court for the Southern District of California.

Before BARNES and KENNEDY, Circuit Judges, and BARTELS,* District Judge.

KENNEDY, Circuit Judge:

In this case the Government failed to establish either the legality of a search or that certain key testimony

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* Honorable John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

procured in consequence of this illegal government activity was so attenuated from it as to be admissible. Application of the exclusionary rule requires that we reverse appellants' convictions. Each appellant was convicted on one count of conspiracy to transport aliens, 18 U.S.C. § 371; 8 U.S.C. § 1324, and on four counts of transportation of illegal aliens, 8 U.S.C. § 1324(a)(2).

On June 29, 1977 one Ventura arrived at the San Clemente checkpoint driving a car containing five illegal aliens, all of whom were concealed in the trunk. Appellant Rubalcava was among those hidden there. Appellant Serrato was the registered owner of the vehicle, but he was not present during the events in question. Border patrol agents stopped the car at the checkpoint and directed Ventura to a secondary area. There Ventura was recognized by agent Slocumb, who had arrested Ventura for smuggling aliens through the same checkpoint two weeks earlier. Slocumb advised agents Foster of these facts, and Foster approached the car to speak with Ventura.

The record is meagre at this critical point. There was testimony that Ventura left the car and walked slowly toward the trunk, his head down, with a "dejected, hangdog demeanor." The only further description of the circumstances of the search which followed is embodied in a portion of Slocumb's testimony:

> Defense Counsel: And there was a search of the trunk at that time, sir, when he came to the rear of the vehicle?
>
> Slocumb: The trunk was open [sic] and the evidence was taken into custody.

Record, vol. VII at 21. The "evidence" to which Slocumb referred was the five illegal aliens.

At trial on the conspiracy and transportation of aliens charges, three of the aliens found in the trunk testified that Rubalcava had arranged for their illegal entry, and that Serrato, the registered owner of the car driven by Ventura, was a conspirator and a principal in the illegal activity as well. Thereupon Ventura, who was a codefendant with Rubalcava and Serrato, took the stand and further implicated both of his codefendants. Appellants argued, and they reiterate on appeal, that evidence given by the officers regarding discovery of the illegal aliens and all of the testimony of Ventura and of the witnesses found in the trunk should be suppressed as the results of an allegal search. We agree.

The Government concedes that appellants have standing to object to the search. Serrato has standing by virtue of his ownership of the vehicle which was searched, *United States v. Mulligan*, 488 F.2d 732, 736-37 (9th Cir. 1973), and Rubalcava's standing arises from his having been, by consent of the owner of the premises or his agent, within the zone of privacy invaded by the search, *Jones v. United States*, 362 U.S. 257, 260-67, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). It is therefore proper for us to consider appellants' objections to the search and to use of the testimony obtained as a result of it.

[1, 2] A checkpoint stop for brief questioning is lawful, but subsequent searches of the vehicle may be undertaken only if supported by probable cause or if proper consent for the search has been given. *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.

2d 1116 (1976); *United States v. Ortiz*, 422 U.S. 891 (1975). To establish the legality of such a search, the Government has the burden of proving that one of these conditions was fulfilled. *See Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968); *United States v. Marshall*, 488 F.2d 1169, 1186 (9th Cir. 1973). Here the facts and conditions necessary to determine whether or not the search was lawful are simply absent from the record. That the defendant had previously been arrested for the same crime at the same place, and that he had a "dejected, hangdog demeanor" when he exited the car, are insufficient facts on which to base a finding of probable cause to search for evidence of a crime. Nor does the record disclose whether or not Ventura's exit from the car was voluntary or how the trunk was opened or who opened it. Neither consent nor probable cause was established. Since the Government has not proven otherwise, we must proceed on the assumption that the search was conducted in violation of the fourth amendment.[1]

1. In ruling that the search was lawful, the judge at the suppression hearing made a statement suggesting that although an officer lacked probable cause to search, nonetheless his good faith, subjective belief that existing circumstances endanger human life may justify a search:

> All we are going to have to do is someday leave about five aliens in the back of a car with a faulty exhaust and let it sit there about an hour with the motor running and you are going to have five people dead in the back of a car all because somebody thinks you should check the registration and get a search warrant, and so forth. These officers have a tough task. They are dealing with human beings, with lives. No question in this officer's mind, his sincerity, belief that there were aliens in the car and the sooner they get them out of there, the better they are going to be.

Record, vol. VII at 29. It is not even clear on the record before us who opened the truck of the car, and we may not speculate about that fact, much less about the state of mind of whoever did open the trunk. The invitation to recognize that a policeman should be encouraged to act in emergency circumstances, and to accommodate such action by defining an exception to the exclusionary rule based on subjective intent is tempting. However, such a rule would be a clear extension of existing precedents, if indeed it would be justified at all. In any event, even assuming we were to accept the exception proposed below, the Government has not met its burden of establishing facts to support its application here.

The Government nonetheless argues that even if the search were illegal, the testimony of Ventura and of the witnesses discovered in the trunk was so attenuated from the search that it cannot be considered an illegal fruit thereof. The Government's contention is that the testimony was the product of the volition of each witness, and that these independently significant acts intervened to break the causal link to the illegal search. We cannot agree.

[3] In determining whether live witness testimony is "'so attentuated [from an illegal search] as to dissipate the taint,'" *Wong Sun v. United States*, 371 U.S. 471, 487, 491, 83 S.Ct. 407, 417, 419, 9 L.Ed.2d 441 (1963), *quoting Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 103, 84 L.Ed. 454 (1939), the Supreme Court has rejected a per se rule of admission or exclusion even where a cause in fact relationship has been established. *United States v. Ceccolini*, ___U.S.___, 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978).[2] The Court held in *Ceccolini* that before testimony, as opposed to tangible evidence, will be excluded, a "closer, more direct link between the illegality and [live-witness] testimony

2. In addition to the usual appellate hindsight, sharpened by a written transcript, in this case the *Ceccolini* decision, which had not been decided when the case was tried, gives us an additional advantage over the trial court.

is required." Although the sufficiency of the attentuation turns on the facts of each case, a key element is whether the testimony is the product of the witness' independent act of will, neither coerced nor induced by the consequences of the illegal search. *Id.*

[4] Nothing in the record of the case before us indicates that in the time between the search and the trial the witnesses made an independent decisions to come forward to testify either to rehabilitate themselves or to assist the trier of fact in arriving at the truth of the case, or for any other reason. The illegal aliens who testified against appellants not only were discovered as a direct result of the illegal search but were implicated thereby in illegal activity. The record does not show the substance or extent of any conversations or negotiations between the Government and the witnesses, and thus the Government has not rebutted the logical inference on these facts that the incriminating "evidence" discovered in the course of the illegal search was used to persuade these witnesses to testify. As to Ventura, the most reasonable explanation of his sudden decision to testify against his codefendants is that he admitted his guilt only because he saw that matters were going badly at trial. The probability that official government action, based principally on evidence provided by the search, induced Ventura's testimony suggests a close, direct link between the illegal search and the testimony used against appellants.

This case must also be distinguished from *Ceccolini* in that here there is no indication that the connection between the crime and the witnesses would have been discovered from a source independent of the illegal search. *Compare id.* at 1060, (witness' relationship to

defendant was well known to the investigating officers even before the search). It is because the search uncovered the crime itself in the process of commission that the illegal search, the testimony of the officers about the search, and the testimony of the witnesses are so closely, almost inextricably, linked.

Thus the relationship between the illegal search and the testimony challenged by the appellants is so immediate that we cannot find the attenuation necessary to hold the testimony admissible. We do not hold that in every case where an alien is discovered in the course of an illegal search he is necessarily disabled from testifying against persons who assisted his illegal entry. We do so hold on the facts of this case. Since the testimony we hold inadmissible under the exclusionary rule was the substantial basis of the Government's case, appellants' convictions must be reversed. The cases are remanded to the district court for further proceedings consistent with this opinion.

REVERSED and REMANDED.

CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of March, 1979, three copies of the Petition For Rehearing After Denial of Certiorari were mailed postage prepaid, to Hon. Wade H. McCree, Jr., Esq., Solicitor-General of the United States Department of Justice, Washington, D.C.

ROY BEENE
Counsel for Petitioner